STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM COURT OF APPEALS CASE NO. 243492 AND

OAKLAND COUNTY CIRCUIT COURT CASE NO. 01-032868-CH, HON. WENDY POTTS

BARBARA SUE TRAXLER and
NORMA JEAN CASTLE, Successor
Co-Trustees of the NORMAN JOHN
SINCLAIR TRUST DATED MARCH 27, 1996,
Plaintiffs/Counter-Defendants/Appellees,

SUPREME COURT NO. 125948

v.

SHIRE ROTHBART,
Defendant/Counter-Plaintiff/Appellant.

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

Attorneys for Defendant/Counter-Plaintiff/Appellant
Gregory D. Hanley (P51204)
Christopher S. Olson (P58780)
KICKHAM HANLEY P.C.
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, MI 48067
(248) 414-9900

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

STATEMENT OF BASIS OF JURISDICTION

The Court of Appeals issued its Opinion and Order on March 2, 2004. (Appellant's Appendix, 10a.) Defendant/Counter-Plaintiff Shire Rothbart filed his Application for Leave to Appeal on April 13, 2004, within 42 days of that Opinion. This Court therefore has jurisdiction under MCR 7.301 (A)(2) and 7.302 (C)(2)(b). This Court granted leave to appeal on December 27, 2004. (123a.)

QUESTION PRESENTED

1. Whether the Court of Appeals erred in affirming the Circuit Court's holding that, as a matter of law, a contract for the sale of real estate executed by a trust was unenforceable because the contract was only executed by one of the purported co-trustees of the trust where (a) the co-trustee who signed the contract acted at all times as the sole trustee, (b) the trust instrument expressly authorized "any" co-trustee to bind the trust and (c) to the extent that the signing co-trustee lacked the authority, Defendant did not have actual knowledge of her lack of authority and thus was entitled to enforce the contract pursuant to the Michigan Uniform Trustees' Powers Act, MCL 700.7404?

Defendant/Appellant answers: Yes
Plaintiffs/Appellees answer: No
The Court of Appeals answered: No

STATEMENT OF FACTS

I. The Trust Agreement

Norman John Sinclair, deceased, established a Living Revocable Trust (the "Trust") on March 27, 1996. Complaint, ¶ 1. (62a.) The Trust is governed by the trust instrument (the "Trust Agreement"). (14a.) The Trust owns certain real property in West Bloomfield, Michigan, which is the subject of this suit (the "Property"). Complaint, ¶ 4. (63a.)

The Trust Agreement established Mr. Sinclair as the Trustee and nominated two potential successor co-trustees, one or both of whom would serve in the event of Mr. Sinclair's death or incapacity if they chose to accept such responsibilities. The Trust Agreement provides:

> Upon the Grantor's death, incapacity or resignation from the office of Trustee, when I am unable to serve as Trustee or as a co-Trustee on account of incapacity as provided below, or if I fail to select in writing a successor Trustee within 30 days after receipt of knowledge of the then sole Trustee's resignation or refusal to act, ***the first two of the following, able and willing to act, shall become successor co-Trustees***: First, my daughter above named, NORMA JEAN ***CASTLE***. Second, my daughter, BARBARA SUE ***TRAXLER***. ***If only one named successor is able and willing to act, that successor Trustee may serve as sole successor Trustee.***

Trust Agreement, Section 7.3 A. [Emphasis added.] (37a.)

The Trust Agreement authorized the Trustee to sell the Trust's real property as follows: "The rights, powers and duties of the Trustee with respect to the investment and management of the trust estate of any trust created herein shall include: . . . to sell . . . any property, real or personal." Trust Agreement, Section 8.1 B. (40a.)

The Trust Agreement explicitly states that "any" successor trustee can bind the Trust and thus does not require joint authorization by both co-Trustees of all Trust transactions. Specifically, the Trust Agreement provides that there are "No Limitations On Successor

Trustee's Powers" and that "[a]ny fiduciary power or discretion vested in the Initial Trustee shall be vested in and exercisable by "***any successor trustee***." Trust Agreement, Section 8.3 [Emphasis added.] (44a.) The Trust Agreement defines "Trustee" as "***any successor trustee.***"

> The word "Trustee" as used in this Declaration, except where otherwise specifically provided, shall be construed to apply equally to individual and corporate trustees nominated herein ***if and so long as such nominated trustee acts in such capacity***. . . . The term "Trustee" as used herein . . . includes ***any successor trustee or trustees***.

Trust Agreement, Section 10.6 E. (51a.)

II. Plaintiff Traxler Acted As The Sole Trustee And Castle Never Acted As Trustee.

Plaintiff Traxler testified that she acted as the sole Trustee of the Trust at all relevant times, and that Plaintiff Castle never acted co-Trustee:

> Q: Prior to signing the agreement, had you had discussions with your sister about who could enter into agreements on behalf of the trust?
>
> A: No.
>
> Q: Did your sister ever sign any document or order of the court appointing her guardian or trustee?
>
> A: No.
>
> Q: Did she ever sign anything where she accepted her responsibility as co-trustee under the trust?
>
> A: I don't believe so. I don't know.
>
> Q: Has she – has she ever acted in any way as a co-trustee under the trust?
>
> A: I don't believe so. I don't know what she does.

Traxler Dep., p. 30. (88a.) Indeed, Traxler was the sole authorized signatory on the Trust bank account, which she unilaterally established. *Id.*, pp. 44-45. (92a.)

III. Traxler Executed The Agreement To Sell The Property As The Trustee

After Mr. Sinclair's death in December 2000, Traxler unilaterally undertook to sell the Property, which is located at 2682 Walnut Lake Road in West Bloomfield Township. Traxler

Dep., p. 9. (83a.) On March 21, 2001, Rothbart submitted a written Offer to Purchase Real Estate to Traxler. (58a.) Rothbart offered to purchase the Property for the sum of Four Hundred Thirty Thousand ($430,000) Dollars. (58a.) At the time of Rothbart's offer, Traxler already had received a written offer of $425,000 for the Property. Traxler Dep., pp. 22-23. (86a.)

Traxler accepted the Offer on behalf of the "Norman John Sinclair Trust" in her capacity as "Successor Trustee of the Norman John Sinclair Trust" in writing on March 30, 2001. (60a.) Rothbart acknowledged in writing his receipt of Traxler's acceptance of the Offer on the same date. (60a.) Also on March 30, 2001, Traxler and Rothbart executed an Addendum to the Offer, which accorded Plaintiffs the right to remove certain trees from the Property and for Plaintiff Castle to occupy the Property through June 30, 2001. (61a.) In the Addendum, Traxler again referred to herself as "Successor Trustee of the Norman John Sinclair Trust." (61a.) The signed Offer and the Addendum are hereafter referred to collectively as the "Agreement."

Traxler testified that she acted entirely on her own in entering into the Agreement, and did not inform Castle of the Agreement until after she executed it on March 30, 2001. Traxler Dep., pp. 27, 29. (87-88a.) At the time she signed the Agreement, Traxler believed that she was fully authorized to execute the Agreement and bind the Trust, and she believed that she had entered into a binding Agreement on behalf of the Trust. *Id.*, pp. 27, 41. (87, 91a.)

Prior to the execution of the Agreement, Rothbart specifically asked whether Traxler was authorized to bind the Trust. Traxler specifically represented to Rothbart that she was fully authorized to execute the Agreement. *Id.* at pp. 27-28. (87a.) Moreover, Traxler never identified Castle as a co-Trustee or provided Rothbart with any documents that identified the persons who allegedly were the Trustees of the Trust. *Id.*, p. 28. (87a.)

IV. Plaintiffs' Efforts To Renege On The Agreement

After the Agreement was consummated, Traxler informed Castle that she had entered into the Agreement to sell the Property. *Id.*, pp. 28-29. (87-88a.) Castle became "very upset" and angry, and stated that "[t]here's no way I'll ever sell for that price." *Id.*, p. 29. (88a.) Plaintiffs then retained an attorney and began looking for a way to renege on their obligation to sell the Property. *Id.*, p. 34. (89a.)

Traxler allegedly informed Rothbart that the "Purchase Agreement was null and void due to the fact that Successor Co-Trustee, Norma Jean Castle, did not authorize, assent to or sign the agreement to purchase the property." Complaint, ¶ 12. (64a.) Plaintiffs sought to back out of the Agreement because they had an appraisal performed which indicated that the Property allegedly is worth more than $430,000 and because Plaintiffs allegedly received another offer to purchase the property for $650,000. Complaint, ¶¶ 13-14. (64-65a.)

V. Proceedings Below

Plaintiffs' June 27, 2001 Complaint sought a declaration that the Agreement was unenforceable because both Traxler and Castle, as co-Trustees of the Trust, must sign any agreement to sell Trust property and Castle did not sign the Agreement. (62a.) Defendant's counterclaim sought, *inter alia*, specific performance of the Agreement. (70a.)

A. Circuit Court Proceedings

In January 2002, Rothbart moved for summary disposition on his specific performance counterclaim. Rothbart raised three independently dispositive grounds for summary disposition: (1) Traxler was the sole Trustee at the time she signed Agreement and she had sole authority to bind the Trust; (2) even if there were two Trustees, the Trust Agreement expressly authorizes

"***any***" co-Trustee to convey land Castle's signature was unnecessary to bind the Trust; and (3) even if the Trust instrument required both co-Trustees' signatures, the Michigan Uniform Trustee Powers Act MCL 700.7404 ("Section 7404") expressly precludes Plaintiffs' claim that that the Agreement is unenforceable because Traxler lacked such authority where, as here, Traxler expressly represented that she was authorized and Rothbart had no knowledge of Castle's alleged status as a co-trustee at the time the Agreement was signed.

Plaintiffs also filed a motion for summary disposition claiming that the Agreement was unenforceable because Castle did not sign it. Plaintiffs argued that Castle was a co-Trustee, that the Trust Agreement required both co-Trustees to authorize the sale of the Property, and that Section 7404 of the Trustees' Powers Act was inapplicable.

The Court heard oral argument on the motions on February 27, 2002. (101a.) Upon Plaintiffs' request, the Court then allowed the parties to submit supplemental briefs on the issue of whether MCL 700.7404 applied under the circumstances. The Circuit Court's June 13, 2002 Opinion and Order held that Rothbart "is not entitled to specific performance of the purchase Agreement" and that "Plaintiffs are entitled to a declaration that the Agreement is null and void." Circuit Court Order, p. 8. (8a.)

The Circuit Court first found that Section 8.3 did not empower "any" successor co-Trustee to bind the Trust:

> The Court disagrees with the Defendant and does not find that section 8.3 of the Trust gives only one trustee, when two are acting, the authority to enter into the purchase Agreement at issue. ... Although the language in section 8.3 of the Trust contains the word "any," this section of the Trust simply states a successor trustee has the same powers as the initial trustee. Furthermore, there is no other language in the Trust granting one trustee the authority to act when there are co-trustees.

Id., p. 8. (8a.)

The Court then held that Section 7404 did not render the Agreement enforceable because, absent Castle's signed authorization, the Trust could not convey marketable title to the Property:

> The Court further finds that although MCL 700.7404 provides protection under certain circumstances to a third party who relies on a trustee's authority, the Defendant cannot rely on that statute to enforce the Agreement because the Agreement requires marketable title be transferred to the purchaser or that the earnest money deposit be refunded. The Plaintiffs in this case have presented evidence that title will not be insurable and the Defendant has presented no evidence to the contrary.
>
> More specifically, the Plaintiffs have presented an affidavit from an expert stating title would not be insured without the signature of both co-Trustees. The expert's opinion is supported by Michigan Land Title Standards and case law. Again, see *Nichols v. Pospiech, Id.* The Court notes MCL 700.7404 only protects third parties dealing with a trustee without knowledge of the trustee's lack of authority and would not require that a title company insure title.

Id., pp. 8-9. (8-9a.)

The Court, relying upon an affidavit submitted by Plaintiff Castle, then rejected Rothbart's argument that Traxler acted as the sole Trustee:

> Finally, the Court finds that Norma Jean Castle has submitted an affidavit indicating that at no time was she unwilling to act as Co-Trustee and the Defendant has failed to provide evidence or an affidavit stating otherwise. Thus, pursuant to MCR 2.116 (C)(10), the Court finds there is no question of fact that the Plaintiffs cannot convey marketable title to the Defendant as required by the Agreement, making the Agreement null and void.

Id., p. 9. (9a.)

After the Circuit Court's ruling, the parties entered into a stipulated order dismissing the parties' remaining claims. (119a.) Thereafter, Rothbart timely appealed the Circuit Court's decision to the Court of Appeals. (121a.)

B. The Court of Appeals' Decision

In the Court of Appeals, Rothbart argued that the Circuit Court erred by holding that, as a matter of law, a contract for the sale of real estate executed by a trust was unenforceable because

the contract was only executed by one of the purported co-trustees of the trust where (a) the co-trustee who signed the contract acted at all times as the sole trustee, (b) the trust instrument expressly authorized "any" co-trustee to bind the trust and (c) to the extent that the signing co-trustee lacked the authority, Defendant did not have actual knowledge of her lack of authority and thus was entitled to enforce the contract pursuant to Section 7404.

The Court of Appeals found that the language of the Trust Agreement was clear and unambiguous. In reading the Trust Agreement, the Court of Appeals dismissed the Trust Agreement's use of the singular form of "trustee" as merely "stylistic." Thus, the Court of Appeals determined that the Trust Agreement's language permitting "any trustee" to act actually required both co-Trustees to jointly sign any agreement to bind the Trust. Court of Appeals Opinion, pp. 1-2. (10-11a.)

The Court of Appeals next determined Castle did not relinquish her authority as co-Trustee. The Court indicated that Castle did not execute a written resignation of her authority and cited Castle's affidavit as evidence that she was willing and able to serve as co-Trustee. *Id.*, p. 2. (11a.) After finding that the Trust required Traxler and Castle to act jointly on behalf of the Trust, the Court held that the Agreement was unenforceable under the statute of frauds. *Id.*, pp. 3-4. (12-13a.)

Finally, the Court of Appeals held that Section 7404 did not protect Rothbart in his contract with the Trust because Traxler did not "exceed her authority as co-trustee" but rather exercised authority she did not have. *Id.*, pp. 3-4. (12-13a.) The Court continued in *dicta*, that even if Traxler improperly exercised her authority, Rothbart was not a "third party" as used in Section 7404. *Id.*, p. 4. (13a.) The Court of Appeals did not decide whether Plaintiffs' inability to deliver marketable

title rendered the Agreement void. *Id.*, p. 4. (13a.)

ARGUMENT

I. Summary of Argument

Section 7404 provides:

> With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee may act or is properly exercising the power. A third person, without actual knowledge that the trustee is exceeding a trust power or improperly exercising it, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the power the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

MCL 700.7404.

The Court of Appeals made two fundamental errors in interpreting Section 7404. First, the Court of Appeals erred in holding that Section 7404 did not apply to protect Rothbart because a trustee who acts outside her authority is not a trustee who "exceeds [her] trust power or improperly exercise[s] it." (13a.) A *fortiori*, a trustee who acts without authority exceeded her authority. Plaintiffs' claim that Traxler acted without authority is plainly within the protected class of trust transactions because Plaintiffs allege that Traxler either acted without authority or improperly exercised her Trustee power.

Second, the Court of Appeals erred in holding that Section 7404 did not apply because that Rothbart was not a protected "third party." (13a.) The Court of Appeals' construction flouts the plain meaning and purpose of Section 7404. Undisputedly, Rothbart was not a party to the Trust Agreement, nor was he a trustee or a beneficiary. Therefore, Rothbart was a third party to the Trust.

Section 7404 protects Rothbart because he had no actual knowledge that Traxler lacked authority to unilaterally bind the Trust. Traxler admitted that she represented to Rothbart that she had authority to enter into an agreement to sell the Property. There is no evidence that Rothbart had actual knowledge that Traxler was not authorized to bind the Trust. Therefore, the plain language of Section 7404 protects Rothbart in his transaction with the Trust and precludes the Trust from raising an *ultra vires* defense to the Agreement.

In addition to misconstruing Section 7404, the Court of Appeals further erred in finding that Traxler was unauthorized to bind the Trust as co-Trustee. (12a.) Section 8.3 of the Trust Agreement clearly and unambiguously states that "[a]ny fiduciary power or discretion vested in the Initial Trustee shall be vested in and exercisable by ***any*** successor trustee." [Emphasis added.] (44a.) This single provision gave Traxler the power to unilaterally bind the Trust, which she exercised in executing the Agreement in her capacity as "Trustee of the Norman Sinclair Trust." (60a.)

Moreover, Traxler was the sole Trustee at the time of the Agreement because it is undisputed that she alone acted in that capacity. The Trust Agreement definition of Trustee is limited to those who act in that capacity:

> The word "Trustee" as used in this Declaration, except where otherwise specifically provided, shall be construed to apply equally to individual and corporate trustees nominated herein ***if and so long as such nominated trustee acts in such capacity. . . .***

Trust Agreement, Section 10.6 E. (51a.) As a result, Traxler had sole authority to bind the Trust, and did so by executing the Agreement. At a minimum, there was a genuine issue of material fact as to whether Castle acted in her capacity as co-Trustee.

Indeed, Traxler admitted that she intended to bind the Trust to sell the Property and believed she had done so by executing the Agreement. (87a.) Only after her sister, Castle, objected to the executed Agreement did Plaintiffs attempt to avoid the Agreement.

For the above reasons, this Court should reverse the Court of Appeals' decision and should grant summary disposition in Rothbart's favor on Plaintiffs' Complaint and on Count I of Rothbart's Counterclaim for specific performance. The Court should remand this action for entry of a judgment of specific performance in favor of Rothbart.

II. Section 7404 Protects Purchasers Against Claims That Trust Transactions Are Invalid Because A Trustee's Power Was Unauthorized or Improperly Exercised

The Court of Appeals erroneously interpreted Section 7404 to permit a Trust to avoid enforcement of a contract by claiming that the trustee's actions were unauthorized or improperly exercised. Section 7404 plainly and unambiguously protects against such claims:

> ***With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee may act or is properly exercising the power. A third person, without actual knowledge that the trustee is exceeding a trust power or improperly exercising it, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the power the trustee purports to exercise.*** A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

MCL 700.7404. [Emphasis added.]

Section 7404 compels reversal even if the Trust Agreement required both co-Trustees to bind the Trust since there is no evidence that Rothbart had actual knowledge that Traxler was acting outside her trust powers. Traxler purported to bind the Trust when she executed the Agreement in her capacity as "Trustee of the Norman Sinclair Trust." (60a.) Moreover, Traxler

admitted that she told Rothbart that she was authorized to enter into the Agreement for the Trust. (87a.) Finally, Rothbart had no actual knowledge of any co-trustees and Traxler admitted that she did not identify any other trustees until after the Agreement was executed. (87a.)

A. This Court Must Enforce The Common Meaning Of "Exceed Authority" And "Third Party" In Construing Section 7404.

All words and phrases in statutes must be construed according to their common and approved usage. MCL 8.3a; M.S.A. 2.212(1); 190 *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 621, 552 NW2d 657 (1996), *aff'd*, 457 Mich 341, 578 NW2d 274 (1998). If statutory language is clear, judicial construction is normally neither necessary nor permitted, and the statute must be enforced as it is written. *Lorencz v Ford Motor Co*, 439 Mich 370, 376, 483 NW2d 844 (1992). Courts may not alter clear, distinct, and unequivocal wording of statute. *Staiger v Liquor Control Commission*, 336 Mich 630, 633, 59 NW2d 26 (1953). The fair and natural import of the terms employed in a statute, in view of the subject-matter, is what should govern in interpretation of the statute. *Nordman v Calhoun,* 332 Mich 460, 466, 51 NW2d 906 (1952).

Effect must also be given to each part of a sentence, so as not to render another part nugatory. *Melia v Employment Security Comm*, 346 Mich 544, 562, 78 NW2d 273 (1956). Judicial construction of a statute or ordinance is inappropriate where the language of the statute is unambiguous. *Lansing v Lansing Twp*, 356 Mich 641, 648-649, 97 NW2d 804 (1959). However, where a statute or ordinance is found to be subject to more than one interpretation, courts must interpret the language in a manner consistent with reason, so as to give effect to the intent of the Legislature. *Melia, supra.*

Courts in construing statutes and, particularly, in determining meaning of statutory terms, implement the purpose and intent of those who enacted statute. *People v Gilbert*, 414 Mich 191, 200, 324 NW2d 834 (1982). The duty of the court is to construe a statute as it reads without reference to equitable considerations. *Geraldine v Miller,* 322 Mich 85, 33 NW2d 672 (1948); *City of Grand Rapids v Crocker*, 219 Mich 178, 189 NW 221(1922); *Bankers' Trust Co of*

Detroit v Russell, 263 Mich 677, 249 NW 27(1933). The Legislature is presumed to use words that have been subject to judicial interpretation in the sense in which they have been interpreted. MCL 8.3a; MSA § 2.212(1); *Kirkley v General Baking Co*, 217 Mich 307, 316, 186 NW 482 (1922).

B. Section 7404 Applies Because Plaintiffs' Claim That Traxler Lacked Authority To Bind The Trust Is, A Fortiori, A Claim That The Trustee Exceeded Her Authority Or Improperly Exercised It Since Traxler Was Undisputedly A Trustee.

The Court of Appeals erroneously held that Section 7404 did not apply because Traxler did not "exceed her authority" but rather, Traxler did not have such authority to act. Court of Appeals Opinion, p. 4. (13a.) With all due respect, the Court of Appeals construction is illogical and flouts the common meaning of the term and purpose of Section 7404. It is undisputed that Traxler was a designated Trustee who alone had acted on behalf of the Trust. The Trust Agreement specifically authorized trustees to sell the Trust's real property. Moreover, MCL 700.7400 *et seq* authorizes a trustee to act on behalf of a trust. Indeed, the Court of Appeals recognized that Traxler had authority to open the Trust checking account – even without Castle's authorization or consent. *Id.*, p. 2. (11a.) Thus, Traxler was authorized to act in some capacity for the Trust.

The Court of Appeals' reasoning that a person cannot exceed authority that they do not have only makes sense if that person has no relationship to the Trust (i.e., is not a Trustee). For example, a person who poses as a trustee to defraud others and is not a trustee has no authority whatsoever and, as such, every act they do is an act without authority. The Court of Appeals' reasoning is erroneous in this case because it is beyond cavil that Traxler actually was a Trustee and possessed at least some authority to act as such.

When a trustee is granted some level of authority, that authority defines any future acts. Those acts are either within or outside the authority granted. When a trustee acts outside its authority, he has, by definition, exceeded his authority. Here, the Court of Appeals correctly determined that Traxler had some authority to act unilaterally on behalf of the Trust. (11a.) Therefore, the only possible dispute is whether Traxler exceeded her authority or improperly exercised it when she signed the Agreement.[1] As such, the Court of Appeals' holding that a co-trustee who acts beyond their authority does not exceed their authority as applied in Section 7404 is reversible error.

Moreover, Rothbart would be "fully protected" from Plaintiffs' claim that Traxler "improperly exercise[d]" her co-Trustee authority by signing the Agreement without Castle since Section 7404 includes those matters among the class of protected defenses. The Court of Appeals did not address this aspect of Section 7404.

C. Rothbart Was A Protected "Third Party" Because He Was Not Party To The Trust Agreement

The Court of Appeals erred in holding that Section 7404 did not fully protect Rothbart because he was not a "third party" within the meaning Section 7404. The Court of Appeals explained that "Defendant's status arises from a contractual dispute where defendant is a primary party to that contract. As such, defendant does not qualify as a third person and cannot avail himself to the statute's protection." Opinion at 4. (13a.)

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[1] Taking the Court of Appeals' decision to its logical conclusion, Section 7404 cannot be applied to acts of an actual trustee, rather only those posing as a trustee with no authority. Even if the Court was limiting its ruling to trusts with co-trustees, the Court's ruling would exempt all co-trustees from Section 7404 – a result inconsistent with the plain meaning of the statute.

Clearly, the term "third party," as used in Section 7404, refers to persons who are not parties to the trust. In other words, any person who is not a settlor, trustee or beneficiary of a trust is a "third party" to the trust. No other definition makes sense. Section 7404 explicitly protects persons, like Rothbart, that deal innocently with trusts via trustees. If Section 7404 does not protect the innocent party that contracts with a trust on the basis of the representation of a trustee's authority, then it applies to no one. In other words, if Rothbart is not a "third party" within the meaning of Section 7404, the provision is a nullity, since all persons who deal contractually with the trust would automatically be denied "third party" status. *Melia,* 346 Mich at 562, 78 NW2d 273. (In construing ordinances and statutes, effect must be given to each part of sentence, so as not to render another part nugatory). Of course, if one does not deal with the trust, one need not rely upon Section 7404.

The Court of Appeals' construction of "third party" necessarily leads to the absurd result that any party who contracts with a trust through a trustee becomes a "party" to the trust, which swallows the class of persons that Section 7404 protects – parties that contract with trusts through trustees. *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 35, 64 NW2d 903 (1954) (Statutes should be construed to avoid absurd consequences). Indeed, the Court of Appeals did not (and could not) identify who would qualify as a "third party" under its construction.

D. Courts Have Recognized That Parties Who Contract With The Trust Are Fully Protected Third Parties Under Section 7404

Courts in other states have interpreted provisions identical to Section 7404 to prohibit a trust from invalidating a real estate sales contract with a purchasing third party because the contract was not authorized by the trust instrument where, as here, the purchaser has no actual knowledge that the trustee was exceeding his or her authority. For example, in *Adler v Manor*

Healthcare Corp, 7 Cal App 4th 1110, 9 Cal Rptr 2d 732 (Cal App 1992), a trustee agreed to sell real property owned by the trust. (124a.) Like Plaintiffs here, certain beneficiaries of the trust sued to invalidate the transaction on the grounds that the trust instrument did not authorize the sale. The court ruled that Section 18100 of the California Uniform Trustees' Powers Act, which is identical to Section 7404, defeated the beneficiaries' claim and rendered the contract enforceable even if the trustee had exceeded his powers in conveying the property at issue. There, the Court observed:

> Section 18100 is not limited, either expressly or impliedly to transactions in personal property, to the exclusion of real property. It protects third parties in *all* transactions with trustees where both the existence of the trust and the status of the trustees are known, and the third parties rely in good faith on the trustees' representations of the scope of their authority. Only where the third parties have *actual knowledge* that trustees are exceeding or improperly exercising their powers do the third parties lose this protection.

9 Cal Rptr 2d at 735 (emphasis in original). The *Adler* court implicitly recognized the obvious – that a purchaser contracting with a trust for the sale of real estate is a "third party" as used in the Uniform Trustees' Power Act and Section 7404.

In *Vournas v Fidelity National Title Ins Co*, 73 Cal App 4th 668, 86 Cal Rptr 2d 490 (1999), the trust agreement at issue required the trustee to obtain the beneficiary's consent prior to transferring certain trust assets. (132a.) The trustee transferred those assets without obtaining consent, and a successor trustee sued the party who had helped the original trustee sell the assets. The Court held that California's counterpart to Section 7404 (Section 18100) barred the successor trustee's claims because the successor trustee failed to show that the third party had actual knowledge of the original trustee's lack of authority. In doing so, the Court observed:

> Section 18100 was specifically adopted to change the prior law that placed ***third parties*** on constructive or inquiry notice of possible breaches of the trust. Section 18100 ***protects third parties who deal with or assist the trustee by excusing them from investigating and permitting them to assume "the existence of a trust***

> ***power and its proper exercise***," except where the third parties have actual knowledge of a breach of the trust.

73 Cal App 4th at 673. [Emphasis added.]

Below, Plaintiffs attempted to distinguish *Adler* because it involved "a single trustee who had power to convey trust property but had exceeded the trust requirement of obtaining an agency's prior approval of the transfer," whereas in this case "there are co-trustees, and the conveyance by one trustee simply cannot convey good title under Michigan's statute of frauds." Plaintiffs failed to demonstrate, however, that this factual distinction is legally significant, and the text of Section 7404 does not in any way render that provision inapplicable to this situation.

In fact, in *Gleason v Elbthal Realty Trust*, 122 NH 411; 445 A2d 1104 (NH 1982), the Court ruled that, if applicable, New Hampshire's counterpart to Section 7404 would render a trustee's sale of real estate enforceable under a factual scenario virtually identical to that presented here. (147a.) The plaintiff in *Gleason* claimed that the trustee had exceeded his powers in conveying real estate because co-trustees did not authorize the transaction. The Court ultimately concluded that the identical provision of the New Hampshire Uniform Trustees Powers Act was not applicable to the case because it was enacted after the conduct at issue and could not be proactively applied. However, the Court concluded that if that provision applied, "the plaintiff would have been fully protected in dealing with [the single trustee] because the statute expressly provides that third persons dealing with a trustee are '... fully protected in

dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise.'"[2]

E. Rothbart Undisputedly Did Not Have Actual Knowledge That Traxler Was Exceeding A Trust Power Or Improperly Exercising It

Although the Court of Appeals did not reach this issue, there is no evidence that Rothbart had actual knowledge that Traxler's actions were unauthorized.[3] Rather all the evidence shows that Rothbart did not have actual knowledge that Traxler signed the Agreement without authority. On this point, Traxler:

- Admitted that she represented to Rothbart that she was authorized to bind the Trust;

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[2] Below, Plaintiffs also argued that because Section 7404 refers in various places to "the" trustee, Section 7404 "contemplates the situation where a third-party is dealing with a trustee who is the only trustee." This argument is ludicrous and is contrary to the express language of Section 7404 which provides "[w]ith respect to a third person dealing with **a** trustee or assisting **a** trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry."

[3] Below, Plaintiffs contended that Rothbart cannot rely upon Section 7404 because he should have known that Traxler lacked authority to bind the Trust. This argument was rejected by the Circuit Court, however, and is meritless for two reasons. First, Plaintiffs' contention is directly refuted by Traxler's own testimony. Indeed, Traxler has admitted (a) that Rothbart specifically asked her about the scope of her authority; (b) that she told Rothbart she was fully authorized to enter into the Agreement on behalf of the Trust; and (c) that she did not identify the purported existence of any other Trustees until after the Agreement was executed. *See* Traxler Dep., pp. 27-28. (87a.) Moreover, at the time she signed the Agreement, Traxler believed that she was fully authorized to execute the Agreement and bind the Trust, and she believed that she had entered into a binding Agreement on behalf of the Trust. *Id.* at pp. 27, 41. (87, 91a.) Rothbart would only lose the protection of Section 7404 if he had "actual knowledge" that Traxler lacked authority to bind the Trust. "Actual knowledge" as used in MCL 700.7404 means actual knowledge. Indeed, as the Tenth Circuit has recognized, "... other states that have adopted provisions of the Uniform Trustees' Powers Act have expressly rejected the view that the term 'actual knowledge' incorporates 'constructive knowledge.'" *Wetherill v Bank IV Kansas, NA*, 145 F3d 1187, 1192 (10th Cir 1998) (citing *Adler*, *supra*, and *Collier v Trustmark National Bank*, 678 So2d 693, 697 (Miss 1996)). (140a) Accordingly, the fact that Rothbart may have been able to learn of Traxler's allegedly unauthorized actions through independent investigation is irrelevant.

- Admitted that she never informed Rothbart of the existence of another trustee until after the Agreement was executed;
- Signed the Agreement as ***the*** "Trustee of the Norman Sinclair Trust."

Accordingly, Rothbart "is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the power the trustee purports to exercise." MCL 700.7404.

Because there are no cases interpreting Section 7404 or its counterparts in other states which support Plaintiffs' efforts to avoid the application of Section 7404 here, Plaintiffs were relegated below to attempting to distinguish cases such as *Adler* and *Gleason* and relying upon two law review articles, which recognize that Section 7404 and its counterparts in other states are "unusually and inexplicably broad" and should be changed. Rothbart submits that the function of the courts is to apply the law as it is, not as Plaintiffs believe it should be. Indeed, "[w]here the meaning of the language of a statute is clear, this Court should refrain from adding judicial gloss." *Stokes v Millen Roofing Co*, 245 Mich App 44, 58, 627 NW2d 16 (2001) (citing *Thrifty Rent-A-Car Systems, Inc v Dep't of Transportation,* 236 Mich App 674, 678, 601 NW2d 420 (1999)). Regardless of commentaries on Section 7404, the Michigan Legislature has determined that innocent third parties, such as Rothbart, should be protected in dealings with trustees. *Stokes v. Millen Roofing Co*, 466 Mich 660, 672, 649 NW2d 371 (2002). ("Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree"). Accordingly, this Court should reverse the Court of Appeals' decision affirming summary disposition in favor of Plaintiffs.

III. The Trust Agreement Authorized Traxler To Bind The Trust

Although Section 7404 is dispositive, the Court of Appeals also erred in construing the clear and unambiguous Trust Agreement to require signatures of both Traxler and Castle to bind the Trust. That holding is inconsistent with the undisputed facts, the Trust Agreement and applicable law.

A. Traxler Acted As The Sole Trustee At All Relevant Times

Although the Trust Agreement provided for co-Trustees, Traxler acted, and was authorized to act, as the sole Trustee at all relevant times. MCL 700.7406 (1) (the trust instrument governs trustee powers.) Consistent with that authority, Traxler admitted that she:

- acted as the sole Trustee at all times prior to the execution of the Agreement;
- was not aware of Castle ever acting as a Trustee or accepting her appointment as a Trustee;
- established a Trust bank account with herself as the sole signatory;
- specifically represented to Rothbart that she was authorized to execute the Agreement; and
- signed the Agreement as ***THE*** Trustee of the Trust.

Traxler Dep., pp. 27-28, 30, 44-45. (60, 87-88, 91-92 a.) Thus, Traxler acted at all relevant times as the sole Trustee.

B. Castle Was Not A Co-Trustee Because She Never Acted As Co-Trustee

The Trust Agreement provides that a successor Trustee's rights and obligations arise only if the nomination is accepted. The Trust Agreement defines "Trustee" as follows:

> The word "Trustee" as used in this Declaration, except where otherwise specifically provided, shall be construed to apply equally to individual and corporate trustees nominated herein ***if and so long as such nominated trustee acts in such capacity***. . . . The term "Trustee" as used herein . . . includes ***any successor trustee or trustees.***

Trust Agreement, Section 10.6 E. [Emphasis added.] (51a.) The Trust Agreement further provides that: "***If only one named successor is able and willing to act, that successor Trustee may serve as sole successor Trustee.***" Trust Agreement, Section 7.3 A. [Emphasis added.] (37a.) The Trust Agreement authorized the Trustee to sell the Trust's real property. Trust Agreement, Section 8.1 B. (40a.) Finally, the Trust Agreement further states that there are "No Limitations On Successor Trustee's Powers" and that "[a]ny fiduciary power or discretion vested

in the Initial Trustee shall be vested in and exercisable by "***any successor trustee***." Trust Agreement, Section 8.3 [Emphasis added.] (44a.) Similarly, the law recognizes that a co-trustee's rights and obligations arise only if the appointment is accepted. *Gaynier v Ginsberg*, 715 SW2d 749 (Tex App 1986) (recognizing that fiduciary duty to beneficiary only would exist if successor trustee accepted its appointment, which was a fact issue). (150a.)

Thus, the Trust Agreement plainly provides that Castle is not a co-trustee unless she acts as a co-trustee. Here, it is undisputed that Castle never acted as a co-trustee or accepted her appointment and thus was not both "willing" **and** "able" to act as successor Trustee within the meaning of the Trust Agreement.[4] As a result, Traxler was the only successor Trustee at the time of the Agreement and her signature alone binds the Trust and satisfies the statute of frauds. Moreover, even if Castle occupied the nominal status of co-successor Trustee, she had ceded her authority to Traxler, who conducted all of the Trust's business. As a result, Traxler had actual authority to execute the Agreement and her signature satisfies the statute of frauds.

In *Rulon-Miller v Carhart*, 544 A2d 340 (Me 1988), a real estate contract was signed by only one of two alleged co-trustees. (160a.) When the trust received a higher offer, the trustees — like Plaintiffs here — claimed that the agreement was unenforceable under the statute of frauds because only one co-trustee signed it. The Court rejected the trust's argument and held that the signing trustee had actual authority bind the trust because the signing trustee was "acting alone made and carried out trust decisions relative to the real estate, including decisions on

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[4] Castle's after-the-fact conclusory statement in her affidavit – relied upon by the Circuit Court and Court of Appeals – that she was willing to act as a co-Trustee cannot change this conclusion. (99a.) The contemporaneous facts demonstrate that Traxler had assumed exclusive control of all aspects of the Trust's business, including the negotiation of agreements and the

maintenance, leasing, sales listing, and rejection and acceptance of offers to purchase." *Id.* at 342. As a result, the signing trustee's signature on the purchase agreement was sufficient to make the agreement enforceable.

C. The Trust Instrument Controls and It Authorizes "Any" Co-Trustee To Convey The Trust's Real Property

The Court of Appeals erred in holding that Section 7406 (4) precluded enforcement of the Agreement. (12a.) MCL 700.7406 (4) provides, in relevant part, that: "Subject to subsections (1) to (3), all other acts and duties shall be performed by both of the trustees if there are 2." However, MCL 700.7406(4) is expressly subject to MCL 700.7406(1), which provides that the Trust instrument governs whether one co-trustee can bind the trust:

> If there are 2 or more trustees and the trust instrument expressly makes provision for the execution of any of the trustees' powers by both or all of them or by any 1 or more of them, ***the provisions of the trust instrument govern***.

MCL 700.7406(1). [Emphasis added.] Because the Trust Agreement expressly authorized Traxler's unilateral exercise of trustee power, the Court must uphold the Agreement and specifically enforce its terms.

As noted above, the Trust Agreement clearly states that "[a]ny fiduciary power or discretion vested in the Initial Trustee shall be vested in and exercisable by ***any*** successor trustee." Trust Agreement, Section 8.3. (44a.) "Trustee" is defined as "any" successor Trustee. *See* Trust Agreement, Section 10.6 E. (51a.) Nothing in the Trust Agreement requires joint action. Thus, the Trust Agreement clearly and unambiguously allowed Traxler to bind the Trust on her own.

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maintenance of the finances of the Trust. (92a.)

The Court of Appeals erroneously disregarded the clear and unambiguous language of Section 8.3 of the Trust Agreement. Michigan courts have repeatedly recognized that "[t]he primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28, 517 NW2d 19 (1994). To this end, courts must determine the intent of the parties from the words used in the document itself and courts may not "make a different contract for the parties or ... look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." *UAW-GM Human Resource Center v KSL Corp*, 228 Mich App 486, 491, 579 NW2d 411 (1998). Here, the settlor's intent is plain – "any" successor Trustee is authorized to bind the Trust. Any other reading of Section 8.3 perverts these express terms.

These rules of construction apply equally to trust instruments. Indeed, in *Sarow v Wawrzynski*, 1999 WL 33453924 (Mich App 1999), this Court noted:

> "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Maloney Trust,* 423 Mich. 632, 639; 377 N.W.2d 791 (1985). ***This rule applies to trusts as well***, *id.,* and this Court has emphasized that "[i]n resolving a dispute concerning the meaning of a will or trust, the court's sole objective is to ascertain and give effect to the intent of the testator or settlor." *In re Nowels Estate,* 128 Mich. App 174, 177; 339 N.W.2d 861 (1983). However, ***the testator's intent must be gleaned from the four corners of the instrument unless there is an ambiguity.*** *In re Maloney Trust, supra* at 639; *In re Woodworth Trust,* 196 Mich. App 326, 327; 492 N.W.2d 818 (1992). "[W]hen there is no patent or latent ambiguity in the provisions of a will, the intention to be ascribed to the testator is that intention demonstrated in the will's plain language." *In re Dodge Trust,* 121 Mich. App 527, 542; 330 N.W.2d 72 (1982), citing *In re Willey Estate,* 9 Mich. App 245, 249; 156 N.W.2d 631 (1967). ***In other words, "[a] court may not construe a clear and unambiguous will [or trust] in such a way as to rewrite it."*** *In re Allen Estate,* 150 Mich. App 413, 417; 388 N.W.2d 705 (1986). The rationale for this rule is that "[t]he law is loath to supplement the language of such documents with extrinsic information. This is especially so in the case of testamentary documents because the maker is not available to provide additional facts or insight." *In re Maloney Trust, supra* at 639. [Emphasis added.]

Here, in reading the word "any" to mean "both," the Court of Appeals impermissibly disregarded the clear and unambiguous language of the Trust Agreement.

Second, Section 10.6 definition of "Trustee" applies "except where otherwise specifically provided." (51a.) Section 8.3, by specifically providing that Trustee powers can be exercised by "any" successor Trustee, manifests a clear intent to vest one co-trustee with the authority to unilaterally bind the Trust and thus creates an exception to the "pluralization" of terms Plaintiffs allege is required by Section 10.6. (44a.) Any other interpretation of Section 10.6 would render the use of the word "any" in Section 8.3 a nullity.

IV. The Agreement Satisfies The Statute Of Frauds

The Court of Appeals erred in holding that "in order to satisfy the statute of frauds, the purchase agreement had to be signed by both Traxler and Castle, or at a minimum, with Castle's consent." Court of Appeals Opinion, p. 3. (12a.) The statute of frauds cannot bar enforcement of the Agreement because: (a) Castle's signature was not required since she never accepted her appointment and never acted as a successor Trustee and satisfies the statute of frauds, (b) even if Traxler and Castle each acted as Trustees, the statute of frauds is satisfied because Traxler signed the Agreement as Trustee, and the statute of frauds does not require both co-trustees to sign an agreement conveying a trust's property; and (c) Section 7404, a later-enacted and more specific statute, trumps the statute of frauds by expressly providing that an unauthorized agreement consummated by a trustee is enforceable.

A. The Statute of Frauds Does Not Require That Both Purported Co-Trustees Execute The Agreement

The statute of frauds does not require that both co-Trustees to sign the Agreement. Indeed, the Court of Appeals did not (and could not) cite any case that holds that a real estate

sales contract signed by only one of two co-trustees is void under the statute of frauds. Instead, the Court of Appeals merely cited *Zurcher v Herveat*, 238 Mich App 267, 277, 605 NW2d 329 (1999) for the general proposition that a contract for the sale of land must be signed by an authorized seller. Court of Appeals Opinion, p. 3. (12a.) However, *Zurcher* did not address whether both signatures are required where two individuals are authorized to sell real property. In any event, the Agreement passes the *Zurcher* test since Traxler, the authorized seller, signed it.

Moreover, the Court of Appeals apparently misconstrued the nature of the transaction. Plaintiffs are not co-owners of the property, nor are Plaintiffs "agents" of the Trust. Rather, the Trust owns the Property and the Trustees are principals of the Trust. "It is a well established legal principle that ***'[a] trustee is not an agent.*** An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another.'" *Heise v Rosow*, 62 Conn App 275, 771 A2d 190 (2001) (quoting *Taylor v Mayo,* 110 US 330, 334-35, 4 SCt 147, 28 LEd 163 (1884) and Restatement (Second) Trusts, § 8 cmt (b) (1959) (emphasis added)).

As principals, Trustees occupy a position *vis a vis* the Trust that is analogous to the position corporate officers occupy *vis a vis* a corporation. Courts applying the statute of frauds to corporate transactions have held that the signature of a single officer is sufficient to bind the corporation and satisfy the statute, and that the officer need not have written authorization to bind the corporation. *Commission on Ecumenical Mission and Relations of the United Presbyterian Church v Roger Gray, Ltd*, 27 NY2d 457, 267 NE2d 467, 469-470 (1971) ("a corporate officer or director is not an "agent" within the meaning of the Statute of Frauds requiring written

authorization"); *Hessler, Inc v Farrell*, 226 A2d 708, 712 (Del 1967) ("since a corporation can act only through its officers and agents, a statutory requirement that the authority to act be in writing does not apply to the corporation's principal executive officers"); *Jeppi v Brockman Holding Co, Inc*, 34 Cal2d 11, 206 P2d 847 (1949) (a corporation's executive officer need not have written authority to enter into a contract, required by law to be in writing, on the corporation's behalf, as he is not merely an agent of the corporation, but a representative thereof).

Here, in executing the Agreement, Traxler, as Trustee, was acting as a principal, not an agent of the Trust. Thus, the provision of the statute of frauds requiring an agent to be lawfully authorized in writing to convey the property of another is inapplicable.

B. Section 7404 Creates An Exception To The Statute of Frauds

Assuming *arguendo* that the statute of frauds would invalidate the Agreement, the Agreement is enforceable because Section 7404 is an exception to the statute of frauds. Section 7404 provides that a "third person, without actual knowledge that the trustee is exceeding a trust power or improperly exercising it, ***is fully protected*** in dealing with the trustee as if the trustee possessed and properly exercised the power the trustee purports to exercise." *Id.* [Emphasis added.] Section 7404 impliedly amends the statute of frauds by limiting the circumstances under which the statute of frauds applies to trust transactions.

In *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 597 NW2d 235 (1999), the Court summarized the rules of statutory construction that apply under these circumstances:

> [T]he rules of statutory construction . . . provide that a more recently enacted law has precedence over the older statute. *Malcolm v. East Detroit*, 437 Mich 132, 139, 468 NW 2d 479 (1991). This rule is particularly persuasive when one statute is both more specific and the more recent.

235 Mich App at 280.

Since Section 7404 was enacted in 1998, long after the statute of frauds, and addresses a more specific situation than the statute of frauds addresses, Section 7404 would control if there is a true conflict between Section 7404 and the statute of frauds. *Travelers Ins*, 235 Mich App at 284-85 (holding that provision of no-fault act "trumped" provision of owner's liability act where no-fault act was enacted later and provision at issue was more specific than its conflicting counterpart in the owner's liability act).[5] Indeed, any other construction would conflict with Section 7404 since no one would be "fully protected" if a Trust could avoid its contractual obligations by simply claiming that the contract is unenforceable under the statute of frauds because an undisclosed co-trustee did not sign the contract.

CONCLUSION

For the above reasons, Defendant Shire Rothbart requests this Court to reverse the Court of Appeals.

KICKHAM HANLEY P.C.
Attorneys for Defendant/Counter-Plaintiff/Appellant

By: 

Gregory D. Hanley (P51204)
Christopher S. Olson (P58780)
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, Michigan 48067
(248) 414-9900

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[5] The same is true for any conflict between Section 7404 and MCL 555.21, another statute relied upon by Plaintiffs.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Robert D. SAROW, Personal Representative of the Estate of Barbara F. Nicholson, Deceased, Petitioner-Appellee,
v.
Chester WAWRZYNSKI, Respondent-Appellant.
No. 207600.

March 5, 1999.

Before: JANSEN, P.J., and SAWYER and MARKMAN, JJ.

PER CURIAM.

***1** In this matter of trust interpretation, respondent appeals as of right from the trial court's order determining that the testator intended to include an unnamed niece on a list of residuary beneficiaries that was an addendum to her trust. The trial court considered extrinsic evidence to determine the testator's intent. Because we find the words of the trust to be clear and unambiguous, we reverse.

The findings of a probate court sitting without a jury will be reversed only upon a showing of clear error. *In re Woodward Trust,* 196 Mich.App 326; 492 NW2d 818 (1992). "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Maloney Trust,* 423 Mich. 632, 639; 377 NW2d 791 (1985). This rule applies to trusts as well, *id.,* and this Court has emphasized that "[i]n resolving a dispute concerning the meaning of a will or trust, the court's sole objective is to ascertain and give effect to the intent of the testator or settlor." *In re Nowels Estate,* 128 Mich.App 174, 177; 339 NW2d 861 (1983). However, the testator's intent must be gleaned from the four corners of the instrument unless there is an ambiguity. *In re Maloney Trust, supra* at 639; *In re Woodworth Trust,* 196 Mich.App 326, 327; 492 NW2d 818 (1992). "[W]hen there is no patent or latent ambiguity in the provisions of a will, the intention to be ascribed to the testator is that intention demonstrated in the will's plain language ." *In re Dodge Trust,* 121 Mich.App 527, 542; 330 NW2d 72 (1982), citing *In re Willey Estate,* 9 Mich.App 245, 249; 156 NW2d 631 (1967). In other words, "[a] court may not construe a clear and unambiguous will [or trust] in such a way as to rewrite it." *In re Allen Estate,* 150 Mich.App 413, 417; 388 NW2d 705 (1986). The rationale for this rule is that "[t]he law is loath to supplement the language of such documents with extrinsic information. This is especially so in the case of testamentary documents because the maker is not available to provide additional facts or insight." *In re Maloney Trust, supra* at 639.

Whether the words of a particular instrument are ambiguous is a question of law, whereas the actual interpretation of the ambiguity is a question of fact. *UAW-GM Human Resource Center, supra* at 491, citing *Port Huron Ed Ass'n v Port Huron Area School Dist,* 452 Mich. 309, 323; 550 NW2d 228 (1996). In addition, facts extrinsic to the instrument may be relied on to prove a latent ambiguity. *In re McPeak Estate,* 210 Mich.App 410, 412; 534 NW2d 140 (1995); see also *In re Kremlick,* 417 Mich. 237, 241; 331 NW2d 228 (1983).

Respondent here argues that the words of the trust agreement are clear and unambiguous, and therefore, that Barbara Nicholson's intent should have been determined by reference only to the trust language and not by resort to any extrinsic evidence. We agree that the trial court erred in considering the testimony of Karl Roth to determine Nicholson's intent and that petitioner's reliance on *Kremlick, supra,* is misplaced.

***2** The addendum to the Barbara Nicholson Trust specifically enumerated the individuals who were the intended residuary beneficiaries. Smith was not among them. As in *In re Woodworth, supra* at 328,

the "language employed suggests but a single meaning...." Whereas in *Kremlick* the extrinsic evidence shed light on the inherent ambiguity of the name "Michigan Cancer Society" and thereby necessitated the court's further inquiry into the testator's intent, in the instant case there was no possibility of ambiguity. The extrinsic evidence presented did not allow for the conclusion that the language used in the trust might have had more than one meaning. Rather, the extrinsic evidence showed only that the testator may well have made a mistake in listing the residual beneficiaries. No latent or patent ambiguity in the actual words of the trust addendum was revealed, and therefore, it was inappropriate for the probate court to consider other evidence of the testator's intent. While we understand the impulse to look to extrinsic evidence in an effort to rectify alleged mistakes on the part of a testator (and we do not quarrel with petitioner that a mstake on Barbara Nicholson's part may well have occurred here), we are equally cognizant that such a practice would allow the language of virtually any will or trust document to be called into question on the basis of extrinsic evidence and involve the judicial system in an increasingly broad range of purely speculative decisionmaking.

The probate court also relied on the pretermitted heir statute, M.C.L. § 700.127(1),(2); MSA 27.5127(1)(2), to support its interpretation of the Barbara Nicholson Trust addendum. The pretermitted heir statute provides in part:

> If a testator fails to provide in the testator's will for any of his or her *children* ... and ... it appears that the omission was not intentional but was made by mistake or accident, the *child,* or the issue of the child, shall have the same share in the estate of the testator as if the testator had died intestate. The share shall be assigned as provided [by law in case of intestate estates, unless it is apparent from the will that it was the testator's intention not to make a provision for the child. [MCL 700.127(1), (2); MSA 27.5127(1), (2) (emphasis added).]

Whether the pretermitted heir statute applies to particular heirs is a question of law. This Court reviews questions of law de novo. *Welch Foods, Inc v. Attorney General,* 213 Mich.App 459, 461; 540 NW2d 693 (1995). We note that when interpreting statutory language, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 83a; MSA 2.212(1). The statute defines "child" as "a person entitled to take as a child under this act by intestate succession from the parent whose relationship is in question and excludes a stepchild, a foster child, a grandchild, or *any more remote descendant who is not so entitled to inherit."* MCL 700.3; MSA 27.5003 (emphasis added). Drawing on the plain meaning of these statutory provisions, we find that the Legislature did not intend the pretermitted heir statute to be applied to nieces and nephews.

***3** Reversed and remanded for proceedings consistent with this question. This Court does not retain jurisdiction.

1999 WL 33453924 (Mich.App.)

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